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BOARD NEWS

Biennial Review/Attorney Fees/"388(4)"

The Board has scheduled a public meeting for the Members to discuss responses received regarding the Board's invitation for written comments concerning its biennial review of attorney fee schedules under ORS 656.388(4). Additional written comments and public testimony will also be considered. Any responses received up to one day before the meeting will be posted to the Board's website prior to the meeting.

The Board meeting has been scheduled for March 7, 2023, at the Board's Salem office (2601 25th St. SE), at 10 a.m. In addition to reviewing the submitted comments, the Members will consider testimony and other written comments presented at, or in advance of, the meeting. Those written comments should be directed to Katy Gunville, WCB's Executive Assistant, at 2601 25th St. SE, Ste. 150, Salem, OR 97302, katy.e.gunville@wcb.oregon.gov, or via fax at (503) 373-1684. The public will also be able to participate in the meeting by means of a "phone conference" link.

A formal announcement regarding the Board meeting will be electronically distributed to anyone who has registered for these notifications at <https://service.govdelivery.com/accounts/ORDCBS/subscriber/new>.

Administrative Law Judge Recruitment

The Workers' Compensation Board intends to fill two Administrative Law Judge positions in the Salem Hearings Division. The positions involve conducting workers' compensation and OR-OSHA contested case hearings, making evidentiary and other procedural rulings, conducting mediations, analyzing complex medical, legal, and factual issues, and issuing written decisions which include findings of fact and conclusions of law.

Applicants must be members in good standing of the Oregon State Bar or the Bar of the highest court of record in any other state or currently admitted to practice before the federal courts in the District of Columbia. The position requires periodic travel, including but not limited to Eugene, Roseburg, and Ontario, and working irregular hours. The successful candidate will have a valid driver's license and a satisfactory driving record. Employment will be contingent upon the passing of a fingerprint-based criminal background check.

The announcement is posted on the Department of Consumer and Business Services (DCBS) website at <https://www.oregon.gov/dcbs/jobs/Pages/jobs.aspx> and contains additional information about compensation and benefits of the position and how to apply.

Questions regarding the position should be directed to Ms. Kerry Anderson at (503)934-0104. The close date for receipt of application materials is March

15, 2023. DCBS is an Equal Opportunity, Affirmative Action employer committed to workforce diversity.

Staff Attorney Recruitment

WCB is currently recruiting for a staff attorney position. The key criteria includes a law degree and extensive experience reviewing case records, performing legal research, and writing legal arguments or proposed orders. Excellent research, writing, and communication skills are essential. Preference may be given for legal experience in the area of workers' compensation.

The recruitment closes on March 13, 2023. Further details about the position and information on how to apply are available online at https://oregon.wd5.myworkdayjobs.com/SOR_External_Career_Site. WCB is an equal opportunity employer.

Attorney Fee Statistical Report Published

The Workers' Compensation Board (WCB) published its annual update of statistical information regarding attorney fees on January 19, 2023. The report includes attorney fee data through year-end 2021, and can be found on the WCB statistical reports webpage using this link:

<https://www.oregon.gov/wcb/Documents/statisticalrpts/011923-atty-fee-stats.pdf>

CASE NOTES

Course and Scope: Claimant's Injury Resulted from "Unexplained Fall" – Facially Nonspeculative Idiopathic Explanation Not Established

Francheter Harvey, 75 Van Natta 65 (February 1, 2023). Applying ORS 656.005(7)(a) and ORS 656.266(1), the Board held that the claimant's right hip and right lower extremity injury resulted from an "unexplained fall," and therefore occurred "in the course of" and "arose out of" her employment. See *Sheldon v. U.S. Bank*, 364 Or 831, 844 (2019); *Guill v. M. Squared Transp., Inc.*, 277 Or App 318, 323-24 (2016). In reaching this conclusion, the Board determined that the opinions of an examining physician and a physician who performed a records review were conclusory and unexplained, and therefore did not establish facially nonspeculative idiopathic explanations for the claimant's fall. See *Sheldon*, 364 Or at 847; *Moe v. Ceiling Sys.*, 44 Or 429, 433 (1980); *Catherine A. Sheldon*, 72 Van Natta 580, 588 (2020).

Moreover, even assuming there were facially nonspeculative explanations for the claimant's fall, the Board determined that the record persuasively established that the explanations were, in fact, speculative. See *Sheldon*, 364 Or at 847. Accordingly, the Board found that the claimant's injury claim was compensable.

Even assuming there were facially nonspeculative explanations for the claimant's fall, the record persuasively established that the explanations were, in fact, speculative.

Motion to Remand under ORS 656.295(5) Denied – Must Object and Request Change of ALJ at Hearings Level. Medical Causation – ALJ Free to Evaluate Evidence Regardless of Specific Arguments

Gilbert E. Vilca-Inga, 75 Van Natta 108 (February 28, 2023). Applying OAR 438-006-0095(5), the Board denied the claimant's request for remand based on alleged bias. Contending that the ALJ was biased because he found that a physician's opinion was unpersuasive for reasons not specifically articulated in the carrier's closing argument, the claimant requested remand for a new hearing with a new ALJ. The Board stated that if the claimant believed that the ALJ was biased, it was incumbent upon him to have objected and requested a change of ALJ at the hearing level, which he did not do. Further, citing ORS 656.286(6), *Hugh J. O'Donnell*, 51 Van Natta 1394, 1394 n 1 (1999), and *Edison L. Netherton*, 50 Van Natta 771, 772 (1998), the Board noted that the ALJ was free to evaluate the persuasiveness of the physician's opinion irrespective of the specific reasons articulated by the carrier. Accordingly, the Board found that remand was not appropriate.

ALJ was free to evaluate the persuasiveness of the physician's opinion irrespective of the specific reasons articulated by the carrier.

Own Motion Notice Closure Not Premature - No Further Medical Improvement in the Accepted Condition (or "Direct Medical Sequela") Would Reasonably be Expected from Medical Treatment or the Passage of Time

Katherine A. Whitner, 75 Van Natta 81 (February 22, 2023). Analyzing ORS 656.278(6), and relying on claimant's attending physician, the Board held that an Own Motion Notice of Closure was not invalid because the attending physician's reports indicated that claimant's accepted condition, and any alleged "direct medical sequelae," had become medically stationary.

The Board acknowledged claimant's contention that a chronic pain condition constituted a "direct medical sequelae" of the accepted hernia condition and her continued medical treatment for chronic pain established that she was not medically stationary. Yet, the Board determined that claimant's attending physician did not attribute her chronic pain condition to the accepted hernia condition, and even if a relationship between the accepted condition and the chronic pain condition could be supported, the record established that no further medical improvement in the accepted condition (or the alleged "direct medical sequela") would reasonably be expected from medical treatment or the passage of time. Accordingly, the Board found that the Own Motion Notice of Closure was not premature. See *Richard L. Zach*, 70 Van Natta 747, 750-51 (2018) (when the record supported the proposition that the claimant had not treated for her accepted conditions or medical sequelae and those conditions were medically stationary, there was sufficient information to close the claim); *Dwayne L. Minner*, 67 Van Natta 2006, 2010 (2015).

Claimant's attending physician did not attribute her chronic pain condition to the accepted hernia condition.

Own Motion Notice of Closure Set Aside as Premature – Physician Had Not Examined Claimant and Applied Incorrect “Medically Stationary” Standard

Adam F. Bruce, 75 Van Natta 87 (February 22, 2023). Applying ORS 656.005(17) and OAR 438-012-0055, the Board held that the record did not persuasively establish that the claimant’s worsened condition was medically stationary at the time of the Own Motion Notice of Closure. Although a physician signed a concurrence letter stating that the claimant’s condition was medically stationary, the Board was not persuaded by the physician’s opinion. Specifically, the Board stated that the physician had not examined claimant or reviewed his treatment records. In addition, the Board was not persuaded that the physician applied the correct “medically stationary” standard (i.e., whether no further material improvement would reasonably be expected from medical treatment or the passage of time). Accordingly, the Board set aside the Own Motion Notice of Closure as premature.

Although a physician signed a concurrence letter stating that the claimant’s condition was medically stationary, the Board was not persuaded by the physician’s opinion.